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Intersessional open-ended Working Group to elaborate  
a draft legally binding normative instrument for the  
protection of all persons from enforced disappearance

First session

Geneva, 6-17 January 2003

**DRAFT REPORT**

**VI. DISCUSSION ON SUBSTANTIVE PROVISIONS (continued)**

**D. Prevention**

**1. Supervision of detentions**

B5

1. On the basis of the draft Convention and the proposals drawn up by the independent expert Manfred Nowak, the participants prepared an initial list of State obligations as regards the supervision of detentions (see below).

**Prohibition of incommunicado detention and of secret places of detention**

2. The participants considered that this prohibition should be absolute.

**Register of detainees**

3. Several participants considered that such registers should be made available to anyone with a legitimate interest in obtaining such information.

4. A few delegations pointed out that the specific structure of some States, for example federal States or States which had devolved a certain amount of power to their provinces, might make it difficult to keep a central register. Several solutions were put forward: the registers

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could be maintained by the federated States, or a register of places of detention could be kept at the federal level. In any event, it was vital that registration of detainees should be carried out at two levels, which was the only way to cross-check information, and hence ensure efficient supervision.

**Respect for the right of detainees to notify their lawyers, families and any persons with a legitimate interest of their situation**

5. A few delegations considered that immediate notification of a lawyer and persons with a legitimate interest, as provided for in the draft Convention, might constitute an excessively onerous requirement, bearing in mind provisions in domestic law that a certain amount of time should elapse between arrest and notification, especially in serious cases.

B5

6. A discussion took place on the need to guarantee the right to respect for the privacy of the detainee, without enabling the authorities to conceal the detention, against the wishes of the detainee. Some speakers considered that the right to respect for privacy was not affected insofar as the information was communicated confidentially to specific individuals.

**Institution of mechanisms of habeas corpus and other guarantees against arbitrary detention**

7. The importance of such mechanisms was emphasized. It was also pointed out that under the draft Convention there was no derogation from the right to a remedy.

8. The importance of judicial supervision of detention was emphasized. The draft Convention provided that other authorities would be competent to perform that function. In that regard, it was suggested that use might be made of the formula "other officer authorized by law to exercise judicial power" from article 9 of the International Covenant on Civil and Political Rights.

**Obligation to conduct an investigation**

9. Attention was drawn to the special importance of investigations, which could halt the process of disappearance.

10. Several participants considered that it should be possible for the investigation to be initiated not only at the request of the family but also automatically when there were grounds for believing that a person had been the victim of a forced disappearance.

11. According to several speakers, the body responsible for the investigation must be independent from the institution being accused, and must be capable of conducting an impartial investigation. It must be provided with the requisite resources and powers, as well as sufficient

authority to conduct the investigation speedily and efficiently. Lastly, one delegation emphasized that article 11 of the draft Convention, under which the authority receiving the complaint must immediately proceed to an investigation, took no account of the fact that some authorities, such as national parliaments, might not have the power both to receive complaints and to investigate. B5

**The need to punish agents of the State who are guilty of obstruction**

12. In the view of most of the participants, the penalties laid down could include non-penal sanctions. The draft Convention could also ensure that no objective ~~criminal responsibility~~ on the part of agents was created. B5

**The need to suspend persons suspected of forced disappearances from all official duties for the duration of the investigation**

13. In the view of several participants, this obligation should take into account the right of the suspected persons to the presumption of innocence. Some delegations pointed out that in the case of high-level personnel such a provision would raise difficulties, bearing in mind the procedures involved, which were sometimes dictated by the Constitution. A more flexible wording, placing an obligation on States to guarantee that investigation procedures would not be influenced by the suspected persons, might be preferable. Several participants emphasized that international law had already adopted the principle that persons who might exercise authority over the complainants, the witnesses and their families, and over the persons carrying out the investigation, should be suspended. There was also a need to ensure that the suspected persons were not in a position to embark on additional violations.

**2. Education and training**

14. Many speakers emphasized the need to strengthen the draft Convention in this area. It should stipulate that the personnel concerned included police and prison staff as well as judges, procurators and lawyers. The precise aims of training should be spelled out: specific mention was made of preventing the involvement of personnel in acts of forced disappearance, and recognition by the personnel of the importance of preventing such acts, investigating and urgently solving cases of forced disappearance. Agents of the State should also be informed of their duty to disobey and of the unlawfulness of orders to carry out a forced disappearance. Training in the specific features of investigations into forced disappearances should also be provided. Lastly, members of the public as a whole should be informed of their rights, as recognized in international law, but also in domestic law. B5

E/CN.4/2003/WG.22/CRP.6

page 4

15. One delegation submitted the following proposal:

"States parties shall ensure that the training of public law enforcement staff and supervisors includes the necessary education concerning the provisions of this convention, in order:

"(a) To prevent the involvement of such staff and supervisors in forced disappearances;

"(b) To ensure that the importance of prevention and of investigations into forced disappearances is recognized;

"(c) To ensure that the urgent need to solve cases of this type is recognized."

16. The Chairperson summed up the discussions as follows:

- In advance of any judicial investigation, provision must be made for the initiation of inquiries into the fate of the person alleged to have disappeared. The question of identifying the independent authorities responsible for such inquiries should be further studied;
- States should guarantee a simple, rapid and effective remedy before a judicial authority. Penal or other sanctions should be laid down for those who hinder access to such remedies;
- All steps should be taken by States to prohibit secret places of detention and incommunicado detention. This implies the taking of an inventory of all detainees and all places of detention. The question arises of how federal States will address this requirement. It will also be necessary to ensure effective supervision of places of detention by the judicial authorities, as well as notification of lawyers and families concerning steps taken with regard to detained persons and the places where they are located;
- The authorities responsible for holding persons in detention should be properly trained. The proposal put forward by one delegation is in keeping with this objective. Mention was made of the need to create awareness among the public concerning the offence of forced disappearance.